Filed 8/19/19 Crespin v. Crimson Pipeline CA2/3

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

ROBERT CRESPIN, Plaintiff and Appellant, v. CRIMSON PIPELINE, LP, et al., Defendants and Respondents.	B290187 (Los Angeles County Super. Ct. No. BC638079)

APPEAL from a judgment of the Superior Court of Los Angeles County, Michael L. Stern, Judge. Affirmed.

The Novak Law Firm and Sean M. Novak for Plaintiff and Appellant.

Cox, Castle & Nicholson, Dwayne P. McKenzie, and Stacy L. Freeman for Defendants and Respondents.

Plaintiff Robert Crespin (plaintiff) brought the present disability discrimination and defamation action against Crimson Pipeline LP (Crimson) and Tracy Moore. The trial court sustained demurrers to plaintiff's causes of action for retaliation (Gov. Code, § 12940, subd. (h)[1]; Labor Code, § 1102.5) and defamation, and it granted summary adjudication of plaintiff's causes of action for unlawful discrimination (§ 12940, subd. (a)), failure to prevent unlawful discrimination (§ 12940, subd. (k)), wrongful termination in violation of public policy, and unfair competition (Bus. & Prof. Code, § 17200 et seq.). We conclude that plaintiff failed to establish error, and thus we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

I.

Background[2]

Plaintiff was born in 1970. When he was 15 years old, he was diagnosed with cancer, for which he was treated with chemotherapy. The chemotherapy successfully treated his cancer, but it caused him to develop a blood disorder called thrombocytopenia, for which he has been under the care of a hematologist.

---

[1] All subsequent undesignated statutory references are to the Government Code.

[2] Consistent with the applicable standard of review, we state the facts established by the parties' evidence in the light most favorable to plaintiff as the nonmoving party, drawing all reasonable inferences and resolving all evidentiary conflicts, doubts or ambiguities in plaintiff's favor. (*Jacks v. City of Santa Barbara* (2017) 3 Cal.5th 248, 273; *Saelzler v. Advanced Group* 400 (2001) 25 Cal.4th 763, 768.)

In October 2014, plaintiff applied through TRS Staffing Solutions, Inc. (TRS), an employment agency, for an operations and maintenance manager (O&M manager) position with Delta Trading, L.P. (Delta), a Crimson affiliate.[3] Robert McElroy, the general manager of Delta's Bakersfield facility, interviewed plaintiff by telephone on October 27, 2014, and in-person on October 29. Delta's Bakersfield facility handles a range of products including asphalt, crude oil, emulsions, aviation gasoline, jet fuel, butane, and natural gas liquids. Tracy Moore, the human resources manager for Crimson Midstream LLC (Midstream), a Crimson affiliate, interviewed plaintiff on November 6, 2014.

What transpired at the conclusion of Moore's interview with plaintiff is the subject of dispute. Plaintiff claims Moore offered him a position with Crimson, which he immediately accepted. Moore says she did not offer plaintiff a position; she also contends the position for which plaintiff was being considered was with Delta, not Crimson.

Following the November 6, 2014 interview, Moore and McElroy spoke to two of plaintiff's former coworkers, Jim Hosler and Ron Morones. In those conversations, Hosler and Morones disclosed that plaintiff had been terminated by a former employer, Kinder Morgan Energy Partners (Kinder Morgan), for falsifying his time records, and that plaintiff had not been Kinder Morgan's "Safety Director," as he had claimed on his resume.

---

[3] Plaintiff appears to contend that the open position was with Crimson, not with Delta. The distinction is not material to our analysis.

On November 7, 2014, Moore told Randy Nodalo at TRS that Delta would not employ plaintiff.

II.
The Present Action

Plaintiff filed the present action against Crimson on October 19, 2016. The initial complaint alleged that Crimson offered plaintiff a position on November 6, 2014, and rescinded the offer the following day "solely due to defendants learning from a former employer of Plaintiff that Plaintiff has a physical disability." The complaint alleged five causes of action: (1) disability discrimination; (2) retaliation; (3) failure to prevent discrimination; (4) wrongful termination in violation of public policy; and (5) unfair competition.

In August 2017, plaintiff filed an amended complaint that added a cause of action for defamation against Crimson and Moore. The defamation cause of action alleged that Moore contacted a third party, Jim Hosler, about plaintiff's past work performance and employment history. Hosler communicated false information to Moore, and Moore repeated this false information to TRS. As a result, plaintiff suffered severe damage to his professional reputation.

III.
Demurrers

Crimson demurred to the retaliation claim in January 2017, and to the defamation claim in August 2017. The trial court sustained the demurrer to the retaliation claim without leave to amend in February 2017, and it sustained the demurrer to the defamation claim with leave to amend in November 2017.

In December 2017, plaintiff filed a second amended complaint that alleged a restated defamation claim, to which

Crimson again demurred. The trial court sustained the demurrer without leave to amend in February 2018.

IV.
Summary Judgment/Adjudication

A. Crimson's Motion for Summary Judgment or Summary Adjudication

In July 2017, Crimson filed a motion for summary adjudication of plaintiff's claims for disability discrimination, failure to prevent discrimination, wrongful termination, and unfair competition. Crimson offered the following evidence in support.

In 2014 and 2015, Moore was the human resources manager of Midstream, an affiliate of Crimson and Delta. In that capacity, Moore helped McElroy, then the general manager of Delta's Bakersfield facility, fill the O&M manager position. This was a senior management position with significant supervisory authority.

In October 2014, TRS provided Moore with plaintiff's resume. McElroy was interested in plaintiff because his resume stated he had been the safety director at Kinder Morgan from 2004—2014. McElroy interviewed plaintiff by telephone on October 27, 2014; subsequently, McElroy and Moore separately interviewed plaintiff in-person on October 29 and November 6, 2014.

During his interview with McElroy, plaintiff said he would not relocate his family to Bakersfield, but instead would rent a room in Bakersfield and commute to Los Angeles on the weekends. This concerned McElroy because the O&M manager had emergency response responsibilities. McElroy also learned during the interview that plaintiff did not have experience with

the production of emulsions and road oils. Finally, McElroy had reservations about whether plaintiff had enough rail and crude oil experience to undertake a significant supervisory position at Delta. Despite these concerns, McElroy thought that plaintiff might be a good candidate for the O&M manager position, and he asked Moore to conduct a follow-up interview.

Moore interviewed plaintiff on November 6, 2014. She perceived plaintiff to be "desperate" for employment, which caused her to question whether he was the right candidate for the position. Moore did not discuss plaintiff's medical condition, and she did not offer plaintiff a job. Her practice was to make job offers in writing, to simultaneously seek written authorization to conduct background checks, and to make clear that any offer of employment was contingent on satisfactory conclusion of the background check and of a pre-employment drug and alcohol test. In plaintiff's case, Moore did not provide plaintiff with a written offer letter or a form authorizing a background check.

Following their interviews with plaintiff, McElroy contacted Morones, and Moore contacted Hosler. Morones and Hosler were Kinder Morgan employees with whom McElroy and Moore were acquainted. Morones told McElroy that Kinder Morgan's policy was not to provide employee references, but he stated that Kinder Morgan did not have a "Safety Director" position. Hosler told Moore that he believed plaintiff had been terminated for falsifying his time records. Hosler did not reveal to Moore that plaintiff had any medical conditions or had brought any claims against Kinder Morgan.

After speaking with Hosler, Moore told McElroy she had learned that plaintiff had been terminated from Kinder Morgan

for falsifying time records.[4] She also communicated her concerns about plaintiff's demeanor. A decision was made not to hire plaintiff. McElroy said he made this decision based on several factors, including concerns that plaintiff had not accurately represented his work experience, had been terminated from Kinder Morgan for falsifying time records, did not plan to relocate to Bakersfield, did not have sufficient supervisory experience, and did not have experience in the production of emulsions and road oils.

On November 7, 2014, Moore sent an email to Randy Nodalo at TRS letting him know that Delta had decided not to hire plaintiff. Minutes later, Moore received a voicemail message from plaintiff offering to provide her with a reference. Moore did not respond. The next day, plaintiff sent Moore an email explaining his view of his termination by Kinder Morgan and disclosing that he was a cancer survivor and had been involved in litigation with Kinder Morgan.

Delta ultimately did not fill the O&M manager position. Instead, it eliminated the position and hired an operations manager in April 2015. The person Delta hired as an operations manager had 40 years of experience in the oil and energy industry, had substantial supervisory experience, and resided in Bakersfield.

---

[4] Moore declared that at the time a decision was made not to hire plaintiff, she had no reason to believe the information provided by Hosler was untrue. Subsequently, she saw documents establishing that Kinder Morgan had, in fact, terminated plaintiff for falsifying his time records and safety reports.

During their interviews with plaintiff, neither McElroy nor Moore discussed plaintiff's medical condition or claims against Kinder Morgan. They learned about plaintiff's medical condition and claims against Kinder Morgan only after Moore informed TRS that Delta would not be offering plaintiff a job. Thus, the decision not to hire plaintiff for the position with Delta was not made with knowledge of plaintiff's alleged disability.

B. Plaintiff's Opposition to Summary Judgment/Summary Adjudication Motion

Plaintiff opposed the motion for summary judgment/summary adjudication. In support, he offered the following evidence.

Plaintiff was employed by Kinder Morgan between 1999 and 2012, including as a safety coordinator and safety director. While employed at Kinder Morgan, plaintiff was hospitalized at least four times. Kinder Morgan terminated plaintiff in April 2012. Plaintiff believed he was terminated because of his cancer history and thrombocytopenia.

In October 2014, TRS submitted plaintiff's name to Crimson for consideration for employment. Plaintiff was interviewed by McElroy telephonically on October 27, 2014, and in-person subsequently. During the in-person interview, plaintiff told McElroy that he was a cancer survivor and had continuing disabilities related to his cancer treatments. He subsequently was interviewed by Moore on November 6, 2014.

At the conclusion of the November 6 interview, Moore formally offered plaintiff a position with Crimson. The offer was not contingent on anything, and plaintiff accepted the offer the same day. Subsequently, plaintiff learned that Moore had contacted Hosler, who had been one of plaintiff's supervisors at

Kinder Morgan, and that McElroy had contacted Morones, a Kinder Morgan executive. Both Hosler and Morones were "certainly familiar with" plaintiff's medical condition and cancer history, and both had been identified as witnesses in plaintiff's discrimination suit against Kinder Morgan.

On November 7, 2014, TRS advised plaintiff that Crimson had rescinded its offer of employment. Plaintiff learned subsequently that Crimson had contacted individuals at Kinder Morgan without his permission and had obtained false information about him, which Moore repeated to TRS. Shortly thereafter, TRS told plaintiff it would no longer assist him in finding employment. He believes TRS relied on false information provided by Moore about his employment at Kinder Morgan in deciding not to continue working with plaintiff.

Plaintiff believes the reasons Crimson gave for terminating or refusing to hire him were "mere pretext," and "the real motivation was based on [his] having medical disabilities and conditions." He believes his age also may have been a factor.

C. Order Granting Summary Adjudication

The trial court granted Crimson's motion for summary adjudication of plaintiff's claims for disability discrimination, failure to prevent discrimination, wrongful termination, and unfair competition. The court found that Crimson articulated a legitimate, nondiscriminatory reason for failing to hire or for terminating plaintiff, and plaintiff failed to produce substantial evidence that Crimson's asserted reasons were untrue or pretextual. Thus, because there was no evidence of discriminatory intent, each of plaintiff's causes of action failed.

V.

Judgment; Appeal

The trial court entered judgment for Crimson and Moore in March 2018. Plaintiff timely appealed.

DISCUSSION

I.

Standards of Review

Plaintiff urges the trial court erred by sustaining demurrers to two causes of action, and by granting summary adjudication as to four others.

" 'In reviewing an order sustaining a demurrer, we examine the operative complaint de novo to determine whether it alleges facts sufficient to state a cause of action under any legal theory.' (*T.H. v. Novartis Pharmaceuticals Corp*. (2017) 4 Cal.5th 145, 162.) If the demurrer was sustained without leave to amend, we consider whether there is a 'reasonable possibility' that the defect in the complaint could be cured by amendment. (*Hendy v. Losse* (1991) 54 Cal.3d 723, 742.) The burden is on plaintiff[] to prove that amendment could cure the defect." (*King v. CompPartners, Inc*. (2018) 5 Cal.5th 1039, 1050.)

In reviewing plaintiff's challenge to the grant of summary adjudication, our standard of review is well settled. Under Code of Civil Procedure section 437c, a motion for summary adjudication shall be granted if all the papers submitted show there is no triable issue as to any material fact and the moving party is entitled to judgment as a matter of law. "A triable issue of material fact exists where ' "the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." ' " (*Regents of University of California v.*

Superior Court (2018) 29 Cal.App.5th 890, 908.) We review an order granting or denying summary adjudication de novo. (*Ibid.*)

Although we independently assess orders sustaining demurrers and granting summary adjudication, "our review is governed by a fundamental principle of appellate procedure, namely, that ' "[a] judgment or order of the lower court is presumed correct," ' and thus, ' "error must be affirmatively shown." ' [Citation.]" (*Case v. State Farm Mutual Automobile Ins. Co., Inc.* (2018) 30 Cal.App.5th 397, 401–402.) Under this principle, plaintiff bears the burden of establishing error on appeal. For this reason, our review is limited to contentions adequately raised in plaintiff's briefs. (*Ibid.*)

II.
The Trial Court Correctly Sustained the Demurrer to the Retaliation Claim

A. Applicable Law

Labor Code section 1102.5 provides in subdivisions (b) and (d) that an employer shall not retaliate against an employee for disclosing information about the employer, or for having disclosed information about a prior employer, to a government or law enforcement agency if the employee reasonably believes that the information discloses a violation of law.[5]

---

[5] Plaintiff's complaint alleged unlawful retaliation under both Labor Code section 1102.5 and Government Code section 12940, subdivision (h). On appeal, plaintiff does not urge error with regard to the Government Code retaliation claim, and thus we do not address it.

In full, Labor Code section 1102.5, subdivisions (b) and (d) provide:

B. Analysis

Plaintiff's retaliation claim alleges that Crimson offered him a position on November 6, 2014, but rescinded the offer the following day. While the rescission of an offer of employment could, in some circumstances, state a claim for retaliation, plaintiff has not alleged that Crimson rescinded the offer because plaintiff disclosed information about Crimson or a prior employer to a government or law enforcement agency. To the contrary, the complaint alleges that Crimson rescinded the employment offer "solely due to defendants learning from a former employer . . . that Plaintiff has a physical disability." It thus fails to state a claim under Labor Code section 1102.5.

"(b) An employer, or any person acting on behalf of the employer, shall not retaliate against an employee for disclosing information, or because the employer believes that the employee disclosed or may disclose information, to a government or law enforcement agency, to a person with authority over the employee or another employee who has the authority to investigate, discover, or correct the violation or noncompliance, or for providing information to, or testifying before, any public body conducting an investigation, hearing, or inquiry, if the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or a violation of or noncompliance with a local, state, or federal rule or regulation, regardless of whether disclosing the information is part of the employee's job duties. [¶] . . . [¶]

"(d) An employer, or any person acting on behalf of the employer, shall not retaliate against an employee for having exercised his or her rights under subdivision (a), (b), or (c) in any former employment."

Further, although plaintiff asserts he should have been granted leave to amend his complaint, he does not " 'show in what manner he can amend his complaint and how that amendment will change the legal effect of his pleading.' " (*Connerly v. State of California* (2014) 229 Cal.App.4th 457, 460.) Accordingly, the trial court properly sustained the demurrer without leave to amend. (*Los Globos Corp. v. City of Los Angeles* (2017) 17 Cal.App.5th 627, 631 (*Los Globos*).)

III.

The Trial Court Correctly Sustained the Demurrer to the Defamation Claim

A. Applicable Law

"Defamation is an invasion of the interest in reputation. The tort involves the intentional publication of a statement of fact which is false, *unprivileged*, and has a natural tendency to injure or which causes special damage." (*Ringler Associates Inc. v. Maryland Casualty* Co. (2000) 80 Cal.App.4th 1165, 1179, italics added.)

As relevant here, Civil Code section 47, subdivision (c) (the "common-interest privilege"), provides that a publication or broadcast is privileged if it is made "[i]n a communication, without malice, to a person interested therein, (1) by one who is also interested, or (2) by one who stands in such a relation to the person interested as to afford a reasonable ground for supposing the motive for the communication to be innocent, or (3) who is requested by the person interested to give the information." This privilege applies " ' "where the communicator and the recipient have a common interest and the communication is of a kind reasonably calculated to protect or further that interest," ' which 'must be something other than mere general or idle curiosity,

such as where the parties to the communication share a contractual, business[,] or similar relationship or [where] the defendant is protecting his [or her] own pecuniary interest.' [Citation.] 'Communications made *in a commercial setting relating to the conduct of an employee* have been held to fall squarely within the qualified privilege for communications to interested persons.' [Citation.]" (*Cornell v. Berkeley Tennis Club* (2017) 18 Cal.App.5th 908, 949, italics added.)

B. Analysis

The second amended complaint alleges that on November 7, 2014, Jim Hosler and Ron Morones conveyed to Robert McElroy and Tracy Moore "false, inaccurate, and untruthful information concerning Plaintiff and his employment history." The same day, Tracy Moore communicated this false information about plaintiff's past work performance to Randy Nodalo at TRS. As a consequence, plaintiff was wrongfully denied a position at Crimson, and TRS declined to continue working with plaintiff. The complaint alleged that these events gave rise to a cause of action for defamation against Crimson and Moore.[6]

Plaintiff contends that Crimson's demurrer should not have been sustained on the basis of the common interest privilege because his second amended complaint "contains ample allegations that dispute that the communications at issue are 'privileged communications' " and "the privilege . . . may be lost if the defendant abuses the privilege by excessive publication or the inclusion of immaterial matters which have no bearing upon the

---

[6] For purposes of discussing plaintiff's defamation claim, we sometimes refer to Crimson and Moore collectively as "Crimson."

interest sought to be protected or if the uttered statements are actuated by malice." But as we have said, communications made in a commercial or business setting relating to the conduct of an employee generally fall within the common interest privilege (*Cornell*, *supra*, 18 Cal.App.5th at p. 949), and plaintiff does not identify any allegations that would tend to suggest that the communications at issue are within a statutory exception—i.e., that they did not concern a topic of common interest, that Crimson published the information "excessive[ly]," or that Crimson acted with malice. Plaintiff also does not suggest any way in which he can amend the complaint to survive demurrer. Accordingly, the trial court properly sustained the demurrer to the defamation claim without leave to amend. (*Los Globos*, *supra*, 17 Cal.App.5th at p. 631.)

IV.
The Trial Court Did Not Err in Granting Summary Adjudication of Plaintiff's Disability Discrimination Claim

A. Applicable Law

The Fair Employment and Housing Act (FEHA) prohibits an employer from, among other things, refusing to hire or discharging a person from employment because of a disability if the person is able to perform the essential functions of his or her job with or without reasonable accommodations. (§ 12940, subd. (a).)

" 'In California, courts employ at trial the three-stage test that was established in *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792, 802 . . . , to resolve discrimination claims. . . . [Citation.] At trial, the employee must first establish a prima facie case of discrimination, showing " ' "actions taken by the

employer from which one can infer, if such actions remain unexplained, that it is more likely than not that such actions were 'based on a [prohibited] discriminatory criterion. . . .' " ' " ' (*Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 520, fn. 2 (*Reid*).) A prima facie claim arises 'when the employee shows (1) at the time of the adverse action [he was a member of a protected class], (2) an adverse employment action was taken against the employee, (3) at the time of the adverse action the employee was satisfactorily performing his or her job,' (*Hersant v. Department of Social Services* (1997) 57 Cal.App.4th 997, 1003) and (4) the adverse action occurred 'under circumstances which give rise to an inference of unlawful discrimination.' (*Texas Dept. of Community Affairs v. Burdine* (1981) 450 U.S. 248, 253.) 'Once the employee satisfies this burden, there is a presumption of discrimination, and the burden then shifts to the employer to show that its action was motivated by legitimate, nondiscriminatory reasons. [Citation.] A reason is " 'legitimate' " if it is "facially unrelated to prohibited bias, and which if true, would thus preclude a finding of discrimination." [Citation.] If the employer meets this burden, the employee then must show that the employer's reasons are pretexts for discrimination, or produce other evidence of intentional discrimination.' (*Reid*, at p. 520, fn. 2, italics omitted.)" (*Nakai v. Friendship House Assn. of American Indians, Inc.* (2017) 15 Cal.App.5th 32, 38–39 (*Nakai*).)

"In the context of a defense motion for summary [adjudication], '[a]ssuming the complaint alleges facts establishing a prima facie case that unlawful [discrimination] occurred, the initial burden rests on the employer (moving party) to produce substantial evidence (1) negating an essential element

of plaintiff's case or (2) (more commonly) showing one or more legitimate, nondiscriminatory reasons for its action against the plaintiff employee . . . .' " (*Nakai*, *supra*, 15 Cal.App.5th at p. 39.) If the employer does so, the employee "then has the burden to produce 'substantial evidence that the employer's stated nondiscriminatory reason for the adverse action was untrue or pretextual, or evidence the employer acted with a discriminatory animus, or a combination of the two, such that a reasonable trier of fact could conclude the employer engaged in intentional discrimination.' " (*Hicks v. KNTV Television, Inc.* (2008) 160 Cal.App.4th 994, 1003.) "The plaintiff's evidence must be sufficient to support a reasonable inference that discrimination was a substantial motivating factor in the decision. [Citations.] The stronger the employer's showing of a legitimate, nondiscriminatory reason, the stronger the plaintiff's evidence must be to create a reasonable inference of a discriminatory motive." (*Featherstone v. Southern California Permanente Medical Group* (2017) 10 Cal.App.5th 1150, 1159.)

B. Plaintiff Alleged a Prima Facie Case of Discrimination

Plaintiff's first amended complaint alleged a prima facie case of disability discrimination.[7] Specifically, plaintiff alleged

---

[7] On appeal, plaintiff urges that he also established a prima facie case of age discrimination because there was evidence that he was more than 40 years of age when he applied for the position with Crimson. Because plaintiff's complaint did not allege age discrimination, we do not reach this issue. (See *Howard v. Omni Hotels Management Corp.* (2012) 203 Cal.App.4th 403, 421 [scope of the issues to be addressed in a summary judgment motion generally is "limited to the claims framed by the pleadings. [Citation.] A moving party seeking

that (1) he is an individual with a physical disability—i.e., he has a "physiological disease, disorder, [o]r condition" that "affects [a] . . . major body system[]" and "[l]imits a major life activity (§ 12926, subd. (m))," (2) he received a job offer from Crimson, which subsequently was rescinded,[8] and (3) he was able to perform the position he was offered with or without reasonable accommodations. (§ 12940, subd. (a)(1).)

C. Crimson Produced Substantial Evidence of a Legitimate, Nondiscriminatory Reason for Declining to Hire Plaintiff, and Plaintiff Failed to Raise a Triable Issue of Pretext

In support of its motion for summary adjudication, Crimson proffered several legitimate, nondiscriminatory reasons for failing to employ plaintiff—namely, that (1) plaintiff lacked relevant experience, never having supervised a large number of employees or produced emulsions and road oils, (2) plaintiff did not plan to live in Bakersfield on the weekends, and thus would

---

summary judgment or adjudication is not required to go beyond the allegations of the pleading, with respect to new theories that could have been [pleaded], but for which no motion to amend or supplement the pleading was brought, prior to the hearing on the dispositive motion"].)

[8] Plaintiff asserts there were triable issues of fact as to whether Delta or Crimson ever offered him a position. We agree that there is a factual dispute between the parties as to this issue, but we do not agree that the dispute is material. If plaintiff's alleged disability did not play a role in the decision not to employ plaintiff, then the employment decision—whether characterized as a termination or a failure to hire—did not violate FEHA.

not be available to respond to emergencies, (3) Crimson had been told that the position plaintiff claimed to have held with a former employer did not exist, and (4) Crimson had been advised that a former employer had terminated plaintiff for falsifying his time records. McElroy said that he relied on all of these factors in determining not to offer plaintiff the O&M manager position.

In response, plaintiff has not cited any evidence that the reasons Crimson gave for declining to hire him were pretextual. Instead, plaintiff relies on a single fact—that Hosler and Morones knew he suffered from a blood disorder—to support the twin inferences that (1) Hosler and Morones disclosed plaintiff's disorder to McElroy and Moore, and that (2) McElroy and Moore relied on this knowledge in deciding not to hire plaintiff.[9] Neither inference withstands scrutiny.

First, none of the parties to the conversations between Hosler and Moore, and between Morones and McElroy, has said that plaintiff's medical condition was discussed, and Moore,

---

[9] Plaintiff also asserts that Crimson failed to follow its usual practice of "not even" checking references before making a hiring decision, giving rise to an inference of pretext. In fact, Moore testified that references are checked as part of the hiring process "[i]f we had acquaintances at a company that perhaps the candidate worked for, we would see if we can get a reference check."

Additionally, plaintiff asserts that Crimson has "admit[ted]" that third parties Hosler and Morones "engaged in willful misconduct that constitutes a violation of Labor Code §§ 1050—1054." As neither Hosler nor Morones is a defendant in this action, and plaintiff has not alleged a cause of action for violations of these sections of the Labor Code, we will not address this contention.

McElroy, and Hosler expressly declared under penalty of perjury to the contrary. Plaintiff has not pointed us to any evidence that casts doubt on the truth of these statements—instead, he merely asserts that "[*i*]*t is impossible to believe that* these individuals did not mention [plaintiff's] medical condition . . . in conversation with [Crimson's] managing agent." (Italics added.) We find it entirely plausible that McElroy and Hosler, asked solely about plaintiff's job performance, would not have mentioned his medical condition, and plaintiff's speculation to the contrary is not admissible evidence. Thus, we conclude that plaintiff has not established that McElroy and/or Moore denied plaintiff employment based upon something they learned from Hosler and Morones about plaintiff's blood disorder.[10]

Second, even were we to conclude that McElroy and/or Moore knew of plaintiff's blood condition, plaintiff has not provided us with any evidence from which a trier of fact reasonably could conclude that that knowledge played a role in Crimson's decision not to hire plaintiff or to fire him days after extending him a job offer. Indeed, were Crimson's mere knowledge of plaintiff's medical condition substantial evidence of pretext, then no employer with knowledge of an employee's

---

[10] In his declaration, plaintiff asserts that he told McElroy during his interview in late October that he was a cancer survivor and had continuing disabilities relating to his cancer treatments. Plaintiff also asserts he was formally offered a job in early November. Plaintiff does not appear to rely on this fact on appeal—perhaps because it tends to undermine his contention that McElroy revoked his offer of employment after learning of plaintiff's disability. Plainly, if, as plaintiff contends, Crimson offered hm a job notwithstanding his disability, it makes no sense Crimson would withdraw the offer based on the same disability.

disability could ever obtain summary adjudication of a disability discrimination claim.

To be reasonable, "inferences must be 'a product of logic and reason' and 'must rest on the evidence' [citation]; inferences that are the result of mere speculation or conjecture cannot support a finding." (*Kuhn v. Department of General Services* (1994) 22 Cal.App.4th 1627, 1633.) Thus, although on summary judgment we must indulge all reasonable inferences from the evidence, "this does not mean we must blindly seize any evidence in support of the [non-moving party]." (*Ibid*.) To the contrary, " ' "[i]f the non-moving party rests merely upon conclusory allegations, improbable inferences, and unsupported speculation," summary judgment may be appropriate.' " (*Nelson v. United Technologies* (1999) 74 Cal.App.4th 597, 614.) This is such a case. Thus, summary adjudication of plaintiff's disability discrimination claim was properly granted.

V.
The Trial Court Did Not Err in Granting Summary Adjudication of Plaintiff's Remaining Claims

Plaintiff's remaining claims for failure to prevent discrimination, wrongful termination in violation of public policy, and unfair competition all depend on a finding that Crimson failed to employ plaintiff because of his medical condition. Specifically, plaintiff's second cause of action alleges that Crimson "failed to take all reasonable steps necessary *to prevent discrimination . . . from occurring*;" the third cause of action alleges that by "violating California's Labor Code's prohibitions against terminating and discriminating against an employee, or otherwise denying employment opportunities, *based upon that*

employee's physical disability or other protected characteristics, defendants' termination of Plaintiff was in violation of fundamental public policies;" and the fourth cause of action alleges that "defendants regularly, willfully, and intentionally engage[d] in unlawful employment practices, *including disability discrimination*. [¶] . . . [¶] . . . Defendants' violations of the Government Code . . . constitute continuing and ongoing unlawful activities prohibited by Business and Professions Code sections 17000 et. seq. and 17200 et seq." (Italics added.)

For the reasons stated above in connection with plaintiff's disability discrimination claim, Crimson carried its summary adjudication burden of showing it had legitimate, nondiscriminatory reasons for declining to employ plaintiff, and plaintiff has not raised a triable issue of fact as to pretext. Therefore, we affirm the trial court's order granting summary adjudication of these claims as well. (See *Arteaga v. Brink's, Inc.* (2008) 163 Cal.App.4th 327, 355 ["The elements of [plaintiff's] common law disability [wrongful] termination claim are the same as those of his FEHA claim. . . . As a result, the wrongful termination claim fails for the same reasons as the FEHA claim"].)

DISPOSITION

The judgment is affirmed. Defendants are awarded their appellate costs.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EDMON, P. J.

We concur:

LAVIN, J.

DHANIDINA, J.